

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MISSY CHANNEL)	
Claimant)	
VS.)	
)	Docket No. 1,019,701
ARROWOOD LANE NURSING HOME)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the November 22, 2004 preliminary hearing Order of Special Administrative Law Judge Marvin Appling. Claimant was awarded benefits in the form of temporary total disability compensation and ongoing medical care, with Timothy C. Spears, D.O., ordered as the authorized treating physician. Respondent contends claimant failed to prove accidental injury arising out of and in the course of her employment on the dates alleged, arguing that the Special Administrative Law Judge (Special ALJ) exceeded his jurisdiction in awarding temporary total disability compensation, and disputes that claimant provided timely notice of accident.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment on the date or dates alleged?
2. Did the Special ALJ exceed his jurisdiction in granting benefits?
3. Did claimant fail to provide timely notice of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds as follows:

Claimant was employed as a CMA for respondent. She began working for respondent beginning on May 9, 2004, and continuing through her last day worked of September 28, 2004. Claimant alleges several accidental injuries during this period of time. Claimant first testified to an accidental injury occurring sometime in August of 2004, when her right arm, neck and upper back began hurting. Claimant sought no medical treatment at that time. She alleges she told respondent's executive director, Peggy Strong, of the incident. However, Ms. Strong, who testified at preliminary hearing, denies being advised by claimant that her pain symptoms were, in any way, related to her work. Additionally, claimant acknowledged at preliminary hearing that she had filed no claim for this first date of accident.¹

Claimant filed only one E-1 in this matter, alleging a series of accidents beginning September 10, 2004, and continuing until her last day worked on September 27, 2004. However, at preliminary hearing, claimant testified her actual last day worked was September 28, 2004. The E-1 lists repetitive lifting in the course of her employment, with injuries to claimant's back, neck and both upper extremities.

Claimant also testified to a specific incident occurring on the Thursday before her termination, which would have been September 23, 2004. Claimant testified that at that time, while assisting a patient, she suffered an injury to her back. Again, claimant advised Ms. Strong of the incident, but Ms. Strong again denies being advised by claimant that she suffered any work-related injury on that date.

When claimant first mentioned the difficulties with her upper extremities, she was referred to Ronald Conaway, the registered nurse on duty that day, but claimant acknowledges Ms. Strong was never told of a work-related connection to those particular injuries. Mr. Conaway has no recollection of claimant being referred to him for any hand complaints.

Claimant first sought treatment with Dr. Spears on September 8, 2004, at which time she complained of back pain and numbness in her hands. There is no mention in Dr. Spears' September 8, 2004 office note of any work-related connection to these complaints. Claimant was next examined on September 16, 2004, at which time Dr. Spears examined only her right wrist, finding numbness and tingling in her thumb and first and second fingers. At that time, she displayed a positive Phalen's and Tinel's sign

¹ P.H. Trans. at 34-35.

on the right, with the doctor concluding that claimant had right wrist carpal tunnel syndrome. Again, there was no mention of any work-related connection to these injuries.

As noted above, on September 23, 2004, claimant was involved in an incident with a patient in respondent's facility. At that time, claimant testified that a patient, whom claimant was helping walk to bathroom, started to fall. When claimant attempted to catch the patient, claimant alleges she again injured her back. Claimant acknowledged she filled out no incident report at that time, but testified that she requested an incident report on several occasions after that. Placed into evidence is an October 6, 2004 letter² written by claimant to Ms. Strong which discusses the request for an incident report and specifically discusses the incident on September 23 with the patient, Mary Isaac. There is no mention in the October 6, 2004 letter by claimant to Ms. Strong of any injuries suffered on that date. In that letter, it merely mentions the fact that claimant had requested an incident report and had, to date, been refused the opportunity to fill one out.

A complaint form regarding the September 23 incident was filed with respondent by Heather Blackburn, respondent's cook.³ Ms. Blackburn advised that the patient, Mary Isaac, had apparently fallen to the floor, and when Ms. Blackburn entered the room, claimant was standing next to the patient, saying things like "just get up," "hurry up" and "I have enough to do already without you messing around." There is no indication in the complaint report that claimant suffered any type of injury. After Ms. Blackburn filed the complaint with respondent, claimant apparently ascertained who filed the complaint report, because she appeared at Ms. Blackburn's residence several days later at 11:00 p.m., with claimant's mother accompanying her. At that time, claimant had a discussion with Ms. Blackburn regarding the patient, identifying the patient by name, and complaining to Ms. Blackburn that the complaint form filed on the September 23 incident nearly cost her her job. This would indicate that this conversation occurred prior to September 28, 2004, the date claimant was actually terminated. Respondent argues the incident involving Ms. Blackburn, which occurred at her home at night in the presence of claimant's mother, constituted a HIPAA violation, as detailed information regarding a patient was discussed in the presence of a non-employee, i.e., claimant's mother.

Claimant was terminated on either September 28 or 29, 2004. The Notice of Termination⁴ states it was September 29, 2004, but claimant testified the actual termination date was the day before. The reason given for the termination was that claimant left medications on the medication cart, unlocked, on top of the cart and unattended. This

² P.H. Trans., Cl. Ex. 5.

³ P.H. Trans., Resp. Ex. 1.

⁴ P.H. Trans., Cl. Ex. 3.

constitutes a safety violation, as the patients in respondent's facility could consume the medications without knowing what it was they were consuming.

Ms. Strong testified that at the time of the termination, claimant made no mention of any work-related injuries. Ms. Strong did acknowledge that claimant had not been provided an incident report for the September 23 incident, explaining the cook had already provided an incident report, describing in detail what had happened with the patient. Again, there was no indication that claimant suffered an injury at that time, as claimant made no allegation of a back injury to Ms. Strong.

Claimant testified that while she was being treated by Dr. Spears, she was provided a splint for her right wrist, which she alleged she wore while employed with respondent. However, Ms. Strong never recalled seeing claimant wearing a splint while working at respondent's facilities.

During her treatment by Dr. Spears, claimant did ultimately advise that her ongoing complaints were in some way connected to her work. On October 4, 2004, she discussed with Dr. Spears a specific incident that occurred on the Thursday before the 29th of September, when a patient started to go down as claimant was walking that patient to the bathroom. Claimant described a severe onset of pain in her back at that time. Claimant also advised Dr. Spears at that time that she believed that her carpal tunnel syndrome, which was symptomatic bilaterally, started at her work several weeks before. Dr. Spears diagnosed probable bilateral carpal tunnel syndrome and acute lumbosacral strain.

At the next examination with Dr. Spears on October 11, 2004, claimant complained of back pain stemming from the lifting incident of the patient and ongoing right arm pain, with no mention of any left side complaints at that time. Claimant again saw Dr. Spears on October 13, 2004, at which time the EMG performed on claimant indicated right ulnar nerve entrapment and a right median mononeuropathy at the wrist, with a recommendation for a referral to an orthopedist. Claimant was referred to orthopedic surgeon David O. King, D.O., who confirmed a possible carpal tunnel syndrome in her right wrist, with surgery recommended as the appropriate course of treatment. Dr. King's office note from November 4, 2004, is limited to mentioning pain, numbness and tingling in claimant's right hand, again with surgery recommended as the appropriate course of treatment. There was no mention of claimant's back or left upper extremity in Dr. King's report.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁵ The Board will determine claimant's multiple injury allegations one at a time. The first injury to claimant's upper extremity, neck and upper back, alleged by claimant to have occurred in August

⁵ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

2004, was acknowledged by claimant to have been connected to no claim filed with the Workers Compensation Division. Therefore, no benefits will be awarded for that alleged injury.

Claimant has alleged two other injuries to her neck, back and upper extremities, one being a series beginning September 10, 2004, and the other being a specific traumatic incident on September 23, 2004. With regard to the September 23, 2004 lifting incident, the Board finds that claimant has failed in her burden of proving that she suffered accidental injury arising out of and in the course of her employment. The complaint report,⁶ completed by Ms. Blackburn, respondent's cook, makes no mention of any injury from the incident of September 23, 2004. Additionally, neither Ms. Strong nor nurse Conaway were advised of any injuries suffered on that date. The first mention in Dr. Spears' medical reports of a work-related accident associated with that incident did not occur until October 4, 2004. The Board finds the evidence in this record insufficient to support claimant's contention that she suffered an injury on that date. Additionally, claimant provided no notice of accident to respondent until on or around October 12, 2004. For a September 23, 2004 injury, this would exceed the 10-day limitation set forth in K.S.A. 44-520. Therefore, claimant's allegation of a work-related accident on September 23, 2004, fails in its timely notice burden, and the Board reverses the Special ALJ's award of benefits for that alleged accidental injury.

Finally, claimant has alleged a series of accidents beginning September 10, 2004, and continuing through her last day worked, September 27, 2004, which has in the record been acknowledged to actually be September 28, 2004.

With regard to whether claimant provided timely notice, using the time computation method as stated in K.S.A. 44-551, for a date of accident of September 28, 2004, October 12, 2004 would be the tenth day.⁷

The medical reports of Dr. Spears, while not as specific as is normally desired, do elude to a connection between claimant's carpal tunnel syndrome and her work. It is apparent claimant at least complained to the doctor, although her complaints were somewhat delayed. However, while claimant alleges bilateral upper extremity complaints, the only symptoms which appear to ultimately concern either Dr. Spears or Dr. King deal with the right upper extremity. That is the only medical treatment which is being recommended for claimant's ongoing symptoms. The Board finds that claimant has shown, by the barest of margins, that she suffered injury to her right upper extremity, with

⁶ P.H. Trans., Resp. Ex. 1.

⁷ K.S.A. 2003 Supp. 44-551(b)(1); *see also McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

treatment for carpal tunnel syndrome being proposed. As claimant's notice has already been determined to be appropriate for the series of accidents through September 28, 2004, the Board will affirm the Special ALJ with regard to claimant's right carpal tunnel syndrome.

With regard to the Special ALJ's Order granting claimant temporary total disability compensation and ongoing medical care, the Board takes jurisdiction over neither of those issues, as the Board's jurisdiction to consider issues on appeal from preliminary hearings is limited under K.S.A. 44-534a and K.S.A. 2003 Supp. 44-551. The Board, therefore, affirms the preliminary hearing Order of the Special ALJ with regard to claimant's allegations of an injury to her right upper extremity for the carpal tunnel syndrome, but reverses the Special ALJ's preliminary hearing Order with regard to the other alleged injuries.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Special Administrative Law Judge Marvin Appling dated November 22, 2004, should be, and is hereby, modified to affirm the Special Administrative Law Judge's determination that claimant suffered accidental injury arising out of and in the course of her employment to her right upper extremity and that notice was timely filed for that accident. In all other regards, the preliminary hearing Order of the Special Administrative Law Judge is reversed and claimant is denied benefits for the other alleged accidents.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director